



United States
Department of
Agriculture

Office of
Administrative
Law Judges

Hearing Clerk

Room 1031
South Building

1400 Independence
Avenue SW

Washington, DC
20250-9200

(202) 720-4443
(202) 720-9776 fax

CERTIFIED RECEIPT REQUESTED

July 9, 2008

Richard Wieking
Clerk, US District Court
United States District Court
Northern District of California
San Jose, California 95113

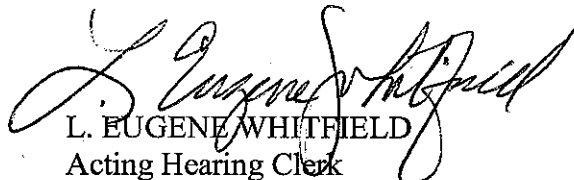
Dear Sir:

Subject: Sunriver Trading company Limited, d/b/a Sunriver Sales,
Complainant vs. Produce Center, Inc., Respondent
PACA Docket No. R-08-022 [Civil Action No. CV 08-80116MISC-JW]

Enclosed are the certified copies of documents you requested from the above captioned-proceeding.

Please contact our office should you have any questions regarding the above matter.

Sincerely,


L. EUGENE WHITFIELD
Acting Hearing Clerk

Enclosures:

fccangeles/7/9/2008

RECEIVED

2008 JUL 14 PM 3:13

RICHARD W. WIEKING
CLERK
U.S. DISTRICT COURT
NO. DIST. OF CA. S.J.

United States of America



DEPARTMENT OF AGRICULTURE

WASHINGTON

Edward T. Schafer, Secretary of the United States Department of Agriculture, do hereby certify that annexed copy, or each of the specified number of annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described:

Sunriver Trading Company Limited, d/b/a Sunriver Sales, Complainant
vs. Produce Center, Inc., Respondent

PACA Docket No. R-08-022 [Civil Action No. CV 08-80116MISC-JW]

1. Complaint, with exhibits attached, filed May 24, 2007, by Norman Evans, President, Sunriver Trading Company Limited d/b/a Sunriver Sales;
2. Answer, with exhibits attached, dated August 13, 2007, signed by Andy Pena, Salesman; and
3. Decision and Order, issued April 23, 2008, by William G. Jenson, Judicial Officer.

In testimony whereof I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia, this

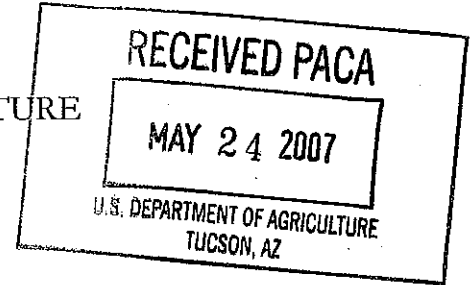
8th day of July, 2008

SECRETARY OF AGRICULTURE

By L. Eugene Whitfield
L. EUGENE WHITFIELD, Acting Hearing Clerk

Office of the General Counsel

UNITED STATES OF AMERICA
BEFORE THE SECRETARY OF AGRICULTURE
PACA FILE # W-07-155
PACA DOCKET NO. _____



SUNRIVER TRADING COMPANY LIMITED)
DBA SUNRIVER SALES)
Complainant)

v.)

PRODUCE CENTER INC.)
Respondent)

COMPLAINT

Complainant above-named respectfully alleges:

1. That Complainant is a corporation, SUNRIVER TRADING COMPANY LIMITED dba SUNRIVER SALES, whose post office address is P.O. Box 2738, Visalia, California 93279-2738.
2. That Complainant is informed and believes that Respondent is a corporation, PRODUCE CENTER INC., whose post office address is 36 E. Romie Lane, Salinas, California 93902.
3. That Respondent, at the time of the transaction involved herein, was licensed, or was subject to license, under the Perishable Agricultural Commodities Act of 1930 as a dealer, commission merchant, and/or broker.
4. That on or about the 6th day of December 2006, in the course of interstate commerce, Complainant by oral contract sold to Respondent 1,950 Red Globe Table Grapes being a perishable agricultural commodity at \$17.70 per

carton plus \$25.00 for temperature recorder for a total FOB invoice value of \$34,540.00, see Exhibit No. 1.

5. That Complainant shipped on December 7, 2006 from loading point in the State of California, in interstate commerce to Respondent at Pompano Beach, in the State of Florida, the kind, quality, and size of commodity called for in said contract of sale and in the manner agreed upon in a truck arranged for by Respondent.

6. That upon arrival of said table grapes at destination, Respondent accepted the commodity in compliance with said contract of sale but has since failed, neglected, and refused to pay Complainant the agreed purchase price amounting to \$34,540.00.

Further, Complainant requests an additional \$300.00 as reimbursement for its payment of the PACA formal filing fee.

7. That the matters and actions set forth herein constitute a violation by Respondent of Section 2 of the Perishable Agricultural Commodities Act of 1930.

8. That there is now due and owing Complainant from Respondent the sum of \$34,840.00, no part of which has been paid.

9. Complainant's exhibits, numbered 1 to 3 inclusive, are original or true copies of original papers relating to the matters involved herein and are attached hereto as a part of this complaint.

WHEREFORE, Complainant prays that a copy of this complaint be served upon the above-named Respondent and that it be required to answer the charges herein stated in writing within such time as the Secretary may require; that, upon the record made, either with or without formal hearing, as provided in the Act or in the regulations, and by appropriate order, the Complainant be awarded such amount of damages as it may be entitled to receive according to the facts established, and that the Secretary also make such other and further orders and take such disciplinary action contemplated by Section 8 of the Act as may be deemed fit and proper in the premises.

Dated this 10th day of May, 2007.

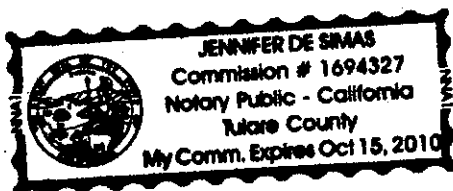
SUNRIVER TRADING COMPANY
LIMITED DBA SUNRIVER SALES

By: *Norman Evans* ✓

Title: President

Norman Evans, being first duly sworn, says that he she has read the foregoing complaint and knows the contents thereof and that the same are true, except as to those matters therein stated on information and belief, and as to such matters he she believes them to be true, and that he she is duly authorized to sign the complaint on behalf of the Complainant. ✓

Subscribed and sworn to before me this 10th day of May, 2007.



Jennifer De Simas
Notary Public

(559) 732-4118

01-19-07 01:55pm From-

6597388788

T-071 P.01/02 F-900

INVOICE



PO. BOX 2738 • VISALIA, CALIFORNIA 93279
 Sales: (559) 592-6400 • Fax (559) 592-6447
 Accounting: (559) 738-8783 • Fax (559) 738-8785

BUYER ID

PO# 82628

SOLD TO PRODUCE CENTER, INC.
 P.O. BOX 37
 SALINAS CA 93902

SHIP TO: PRODUCE CENTER, INC.
 POMPANO BEACH FL

OUR ORDER NO. 43259X
 BROKER:

SALESMAN. JOHN

INSPECTION.
 ROUTING.
 LICENSE NO. C70294

B/L: 43259X

Page 1 of 1

DESCRIPTION	QUANTITY	PRICE	UNIT	AMOUNT
ED GLOBE GRAPES 19# BAG	1950	17.70	each	34,515.00
ICORDER		25.00		25.00

EXHIBIT NO.)

THE PERISHABLE AGRICULTURAL COMMODITIES LISTED ON THIS INVOICE ARE SOLD SUBJECT TO THE STATUTORY TRUST AUTHORIZED BY SECTION 50 OF THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930 (7 U.S.C. 499(c)). THE SELLER OF THESE COMMODITIES RETAINS A TRUST CLAIM OVER THESE COMMODITIES, ALL INVENTORIES OF FOOD OR OTHER PRODUCTS DERIVED FROM THESE COMMODITIES, AND ANY RECEIVABLES OR PROCEEDS FROM THE SALE OF THESE COMMODITIES UNTIL FULL PAYMENT IS RECEIVED. SHOULD ANY ACTION BE COMMENCED BETWEEN THE PARTIES TO THIS CONTRACT CONCERNING THE SUMS DUE HEREUNDER OR THE RIGHTS AND DUTIES OF ANY PARTY HERETO OR THE INTERPRETATION OF THIS CONTRACT, THE PREVAILING PARTY IN SUCH ACTION SHALL BE ENTITLED TO, IN ADDITION TO SUCH OTHER RELIEF AS MAY BE GRANTED, AN AWARD AS AND FOR THE ACTUAL ATTORNEY'S FEES AND COSTS IN BRINGING SUCH ACTION AND/OR ENFORCING ANY JUDGMENT GRANTED THEREIN.

TERMS: ALL SHIPMENTS BASED ON GOOD DELIVERY STANDARDS. ALL CLAIMS OR ALLOWANCES MUST BE SUBSTANTIATED BY A U.S.D.A. INSPECTION AND A TEMPERATURE RECORDING DEVICE REQUIRED. THIS INVOICE IS DEEMED ACCURATE ANY DISCREPANCIES MUST BE BROUGHT TO THE ATTENTION OF SUNRIVER SALES WITHIN 24 HOURS OF RECEIPT. 1.5% PER MONTH WILL BE CHARGED ON PAID BUT UNPAID ACCOUNTS OVER ANNUAL PERCENTAGE RATE. PLEASE RETURN ONE COPY OF INVOICE WITH SHIPMENTS.

1950
 TOTAL QUANTITY

34,540.00 USD
 TOTAL AMOUNT

Received Jan-18-2007 01:48pm From-6597388788

To-Sunriver Sales

Page 001

F-318 1-006/014 010 T-710

65989826427

From-Sunriver Sales 02:48pm 07-17-2007

[illegible]

Total Packages Shipped

TOTAL P. 13.1

EXHIBIT NO. 3

Apr-17-2007 02:47pm From-Sunriver Sales 5585826427 T-710 P.004/014 F-318

UNITED STATES OF AMERICA
BEFORE THE SECRETARY OF AGRICULTURE
PACA FILE # W-07-155
P.A.C.A. DOCKET NO. _____

SUNRIVER TRADING COMPANY LIMITED)	
DBA SUNRIVER SALES)	
Complainant)	
)	ANSWER
v.)	
)	
PRODUCE CENTER INC.)	
Respondent)	

The above named respondent, for answer to the complaint in this proceeding, states:

1. Admitted
2. Admitted
3. Admitted
4. Admitted
5. An USDA inspection was taken on December 11th because of problems in the grapes upon arrival. They failed to make grade due to excessive serious defects. The complainant was promptly notified of problems in the grapes and that the original contract was broken due to product quality. The complainant informed the respondent to have his customer handle the product for his account or P.A.S. terms.
6. Respondent has provided account of sales and paid the complainant the proceeds from his customer less his brokerage. The complainant wants more money than was realized for the product but due to the amount of wet and sticky in the grapes the market was very limited.
7. Denied
8. Respondents check #047811 for \$5,170.73 was deposited by the complainant on May 1, 2007.
9. Respondents exhibits, numbered 1 to 7 inclusive, are original or true copies of original papers relating to the matters involved herein and are attached hereto as a part of this complaint.

Dated this 13th day of August, 2007

PRODUCE CENTER, INC.

By: Andy M. Peña

Title: Salesman

I, Andy M. Peña, Being first duly sworn, says that he has read the foregoing answer and knows the contents thereof, and that the same is true, except as to the matter therein stated on information as belief, and as to such matter he believes it to be true, and that he is duly authorized to sign the answer.

[Signature]

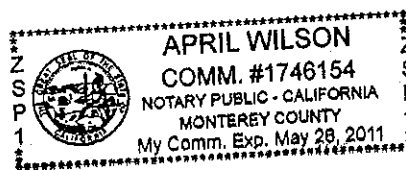
Subscribed and sworn to before me this _____ Day of _____, 2007

STATE OF CALIFORNIA
COUNTY OF MONTEREY

Notary Public

Subscribed and sworn to (or affirmed) before me
this 13 day of August, 2007
by Andy M. Peña
personally known to me or proved to me on the
basis of satisfactory evidence to be the person(s)
who appeared before me

[Signature]
NOTARY PUBLIC



[illegible]

EXHIBIT #1

四三二一

APPLICANT

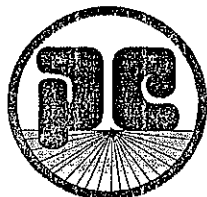


EXHIBIT #2

PRODUCE CENTER, INC.

P.O Box 37 Salinas, California 93902
TOLL FREE: 1-800-538-5842/831-757-8983
FAX: 831-757-2285
Web: www.producecenter.com



★★★★



XXXX

APRIL 24, 2007

MEMO

ATTN.: ACCOUNTS RECEIVABLE
RE.: SUNRIVER #W1299, PRODUCE CENTER #82628

THIS AMOUNT OF \$5,170.73 IS THE NET PROCEEDS FROM THE ORIGINAL RETURN AMOUNT REPORTED TO SUNRIVER. SEE ABOVE FOR REFERENCE.

THANK YOU,

ANDY M. PINA
PRODUCE CENTER. INC.

PRODUCE CENTER, INC.
 ACCOUNT PAYABLE
 P.O. BOX 37 • SALINAS, CA 93902
 (831) 757-8983

WELLS FARGO BANK, N.A.
 (800) 942-6222

047811
 CHECK NO.

90-3842
 1222

PAY

TO THE
 ORDER
 OF

*****FIVE THOUSAND ONE HUNDRED SEVENTY AND 73/100 DOLLARS*****

04/24/2007

CHECK AMOUNT
 *\$5,170.73

SUNRIVER
 P.O. BOX 2738
 VISALIA, CA 93279

⑈047811⑈ ⑆122238420⑆ 066002896⑈

PRODUCE CENTER, INC. P.O. BOX 37 • SALINAS, CA 93902 (831) 757-8983
 Date: 04/24/2007 Vendor: SUNR Check #: 47811

Date	Invoice #	Description
04/24/2007	82628/W1299	
		Check Totals:

Invoice Total	Discount	Net Paid
5,170.73	0.00	5,170.73
5,170.73	0.00	5,170.73

047811

PRODUCE CENTER, INC. P.O. BOX 37 • SALINAS, CA 93902 (831) 757-8983
 Date: 04/24/2007 Vendor: SUNR Check #: 47811

Date	Invoice #	Description
04/24/2007	82628/W1299	
		Check Totals:

Invoice Total	Discount	Net Paid
5,170.73	0.00	5,170.73
5,170.73	0.00	5,170.73

047811

EXHIBIT #3

THIS IS A LEGAL COPY OF
A CHECK. YOU CAN USE IT
THE SAME WAY YOU WOULD
A PHYSICAL CHECK.

11221052763 05/01/2007
0000000112716468

PRODUCE CENTER, INC.
ACCOUNTS PAYABLE
P.O. BOX 37 - MARYSVILLE, CA 95902
(901) 757-8891

44-38861-2735
 P.O. BOX 2735
 VISALIA, CA 93278

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06/26/2007

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 1-2-2021

OSGARD

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200-300
300-400
400-500
500-600
600-700
700-800
800-900
900-1000

100

4486131 + #4

207052

957-7073

Attn:
 JOHN @
 Sun River
 Pg. 1 of 3

EXHIBIT 5



2230 SW 2nd Street, Pompano Beach, FL 33069
 Tel. 1(954) 972-8383ext 130 Fax 1(954) 545-6442
 lucy@sunexp.com

CLAIM SETTLEMENT

Inspection Certificate # M-128702

☒ Shipper Claim

Shipper: PRODUCE CENTER

Shipper Number: 82628

☐ Truck Claim

SunCity Orig PO# 36215

SunCity New PO# 36215

Received Date: Sunday, December 10, 2006

Truck: TRAFFIC FREIGHT

Quantity Received	Quantity Sold	Item	Return
1950	980	GRAPE RED GLOBE CA	\$10.03-
0	970	Dumped	\$0 -
0	Temp. N/A		\$25 -
0			\$ -
0			\$ -
0			\$ -
0			\$ -
0	Freight	on 970 @ 2.61	\$2531.17
0	Handling	970 @ 1.00	\$970.00
	Sub		\$9829.40
	Dump fee		\$600.00
	Insp		\$95.00
	Total Pro-Center		\$2487.50

Authorized Signature: X

Print Name

Please sign and fax back to 1(954) 545-6442 Attn: Lucy

\$5,633.23

NET TO
 SUN RIVER

Att: JOHN C.
SUN RIVER
Pg. 2 of 3

PRODUCE CENTER INC.

P.O. BOX 37
SALINAS, CA 93902
800-538-5842
Fax: 831-757-2285

Invoice

Invoice #: 82628
Ship Date: 12/07/2006
Invoice Date: 12/07/2006
Your P.O. #: 36215
Salesman:

Acct #: 279

Sold To:

SUN CITY PRODUCE CO.
2230 S.W. 2ND STREET
POMPANO BEACH, FL 33069

Ship To:

SAME

Truck: TRIFFIC FREIGHT	Due Date: 12/28/2006	Terms: Net 21 Days
License: E70284 FLA		

Description	Label	Quantity	Units	Price	P/C	Total
GRAPES RED GLOBES	19#	1950	980	\$10.05		35,002.50
RECORDER	A950531		1	25.00		25.00
		1950		Total:		35,027.50

CLAIM

PLEASE SIGN AND FAX BACK

X [Signature] 1/8/07

Claim Adj <25,173.10>
970cs dump fee <600.00>
970cs Freight + \$2.61 <2,531.17>
970cs Handling*1 <970.00>
INSF <95.00>

\$5,658.23

5826447

09-3003

AHL: JOHN - SUN RIVER

(18/02)

CERTIFICATION

Lot/Unit No.

Applicant:

Sun Commodities

INSPECTION CERTIFICATE



PREP: 01-1362151-11

State: U.I.

Address:

Pomona Beach FL

M - 130206

Inspection Number:

Shipper:

Address:

Produce Center

Inspection Started:

01 03 07 08:35 A

Inspection Unit:

Insp Site:

Address:

Applicants Warehouse

Inspection Started:

01 03 07 08:35 A

Inspection Unit:

Insp Site:

Address:

Sun River

Inspection Started:

01 03 07 08:35 A

Inspection Unit:

Insp Site:

Address:

Sun River

Inspection Started:

01 03 07 08:35 A

Inspection Unit:

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Sun River

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GRADE:

REMARKS: APPLICANT STATES ABOVE PRODUCT TO BE DUMPED.

WARNING: Any person who knowingly shall falsely make, issue, alter, forge, or counterfeit this certificate or participate in any such actions, is subject to a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

1. The undersigned, a duly authorized inspector of the United States Department of Agriculture, do hereby certify that at the request of the applicant and on the date indicated, samples of the herein described product were inspected and the quality and/or condition as shown by said samples were as herein stated.

ESTIMATED TOTAL

Inspector's Signature:

Date: 10/25/07

Market Office: Pomona Beach FL

\$ 96.00

APPLICANT

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Sunriver Trading Company Limited,)	PACA Docket No. R-08-022
d/b/a Sunriver Sales,)	
)	
Complainant)	
)	
v.)	
)	
Produce Center, Inc.,)	
)	
Respondent)	Decision and Order

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department in which Complainant seeks a reparation award against Respondent in the amount of \$34,540.00 in connection with one truckload of grapes shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

Although the amount claimed in the Complaint exceeds \$30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation ("ROI"). In addition, the parties were given the

opportunity to file evidence in the form of verified statements and to file Briefs. Complainant filed an Opening Statement. Respondent did not elect to file any additional evidence. Neither party submitted a Brief.

Findings of Fact

1. Complainant, Sunriver Trading Company Limited, doing business as Sunriver Sales, is a corporation whose post office address is P.O. Box 2738, Visalia, California, 93279-2738. At the time of the transaction involved herein, Complainant was licensed under the Act.
2. Respondent, Produce Center, Inc., is a corporation whose post office address is P.O. Box 37, Salinas, California, 93902. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. On or about December 6, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of California, to Respondent's customer, Sun Commodities, in Pompano Beach, Florida, 1,950 cartons of 19-pound bagged Red Globe grapes at \$17.70 per carton, or \$34,515.00, plus \$25.00 for a temperature recorder, for a total f.o.b. contract price of \$34,540.00.
4. On December 11, 2006, at 12:40 p.m., a U.S.D.A. inspection was performed on the grapes mentioned in Finding of Fact 3 at the warehouse of Sun Commodities, in Pompano Beach, Florida, the report of which disclosed 16% average defects, including 2% damage by shattered berries, 1% damage (including 1% serious damage) by crushed, split open berries, 1% damage (including 1% serious damage) by sulphur dioxide injury, 11% damage (including 11% serious damage) by wet and sticky berries, and 1% decay. Pulp temperatures at the time of the inspection ranged from 37 to 38 degrees Fahrenheit.

5. On January 3, 2007, a second U.S.D.A. inspection was performed on 970 cartons of the grapes at the warehouse of Sun Commodities, in Pompano Beach, Florida, the report of which disclosed 28% average defects, including 10% damage (including 10% serious damage) by wet and sticky berries, 4% damage by shattered berries, and 14% decay. Pulp temperatures at the time of the inspection ranged from 38 to 39 degrees Fahrenheit. In the remarks section of the certificate the inspector wrote "APPLICANT STATES ABOVE PRODUCT TO BE DUMPED."

6. Sun Commodities reported gross sales of \$9,854.40 (980 cartons at an average sales price of \$10.03 per carton plus \$25.00 for the temperature recorder), from which it deducted a dump fee of \$600.00 for the 970 cartons of grapes that were dumped, freight in the amount of \$2,531.17 (970 cartons at \$2.61 per carton), handling in the amount of \$970.00, and the U.S.D.A. inspection fee of \$95.00, which left a net amount due Respondent for the grapes of \$5,658.23. From this amount, Respondent deducted \$0.25 per carton, or \$487.50, and paid Complainant the balance of \$5,170.73 with check number 047811, dated April 24, 2007.

7. The informal complaint was filed on January 25, 2007, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover the agreed purchase price for one truckload of grapes sold to Respondent. Complainant has, however, acknowledged in its Opening Statement that Respondent has remitted the sum of \$5,170.73 for the grapes.¹ Therefore, the amount in dispute is the unpaid invoice balance of \$29,369.27. In defense of its failure to pay Complainant this amount, Respondent asserts in its sworn Answer that the grapes failed to make grade due to excessive serious defects, as a result of which Complainant instructed Respondent to have its customer "handle the product for his account or P.A.S. terms."² In accordance with this agreement, Respondent states it has provided an account of sales and paid Complainant the proceeds received from its customer less brokerage.³

In response to Respondent's allegations, Complainant filed additional evidence in the form of an Opening Statement affidavit signed by its salesperson, John Doyle. In the affidavit, Mr. Doyle states he personally negotiated the transaction in question with Respondent's salesman and buyer, Andy Pina. Mr. Doyle states that when Mr. Pina informed him of the U.S.D.A. inspection results, he advised Mr. Pina that he would be more than happy to take the grapes back and move them to a customer in Dallas, Texas. According to Mr. Doyle, Mr. Pina stated at that time that his customer needed the grapes and would sell them right away. Mr. Doyle states he nevertheless informed Mr. Pina on a daily basis that if Respondent's customer was unable to move the grapes quickly and at a good price, he should allow Complainant to move the grapes to its customer in Dallas.

¹ See Opening Statement Affidavit of John Doyle, Complainant's Salesperson, page 2.

² See Answer, paragraph 5.

³ See Answer, paragraph 6.

At one point, Mr. Doyle states Mr. Pina requested that he deal with Respondent's customer directly, but Mr. Doyle asserts that he at all times considered the contract as being with Mr. Pina of Respondent, and that Mr. Pina was responsible for making sure that the grapes were sold promptly and properly for the best advantage of Complainant.⁴ In this regard, Mr. Doyle refers to the U.S.D.A. inspection of January 3, 2007, which shows that 970 cartons of grapes remained unsold as of that date.⁵ Mr. Doyle cites this as evidence that Respondent's customer did not resell the grapes in a prompt and proper manner.⁶

Upon review of the pleadings submitted by the parties, we note first that Respondent suggests in its sworn Answer that the terms of the contract were modified after the grapes were inspected at the place of business of Respondent's customer. Specifically, Respondent states that Complainant advised Respondent to have its customer handle the grapes for "his account" or on "P.A.S." terms. The problem with this statement, however, is that the words used by Respondent may be interpreted as having very different meanings, *i.e.*, the phrase "handling for his account" suggests a consignment agreement,⁷ whereas the term "P.A.S." stands for price after sale, a term that is normally understood as meaning a sale where the price is left to be agreed upon between the parties after the goods are resold.⁸ Moreover, Complainant's response provides no clarity to this issue. While Complainant states that Respondent was responsible for selling the grapes "for the best advantage" of Complainant, a phrase that

⁴ See Opening Statement Affidavit of John Doyle, Complainant's Salesperson, page 2.

⁵ See Answer, Exhibit #7.

⁶ See Opening Statement Affidavit of John Doyle, Complainant's Salesperson, page 3.

⁷ See *United Packing Co. v. D.L. Pizza Co.*, 18 Agric. Dec. 161 (1959).

⁸ See *Eustis Fruit Co., Inc. v. The Auster Co., Inc.*, 51 Agric. Dec. 865 at 877 (1991).

could be interpreted as suggesting a consignment arrangement, this statement may be just as readily understood as meaning that Respondent, having notified Complainant of an alleged breach of contract, was obligated to promptly resell the grapes to minimize the damages flowing to Complainant as a result of the alleged breach. Consequently, since we cannot ascertain the nature of the modification, nor are we certain that a modification was intended, we conclude that the original terms of the contract remained in effect after the grapes were inspected at the contract destination.

Next we will consider whether the evidence establishes a breach by Complainant of the original contract. The grapes were sold under f.o.b. terms, which means that the warranty of suitable shipping condition is applicable.⁹ The Regulations (7 C.F.R. § 46.43(j)) define suitable shipping condition as meaning:

... that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.¹⁰

⁹ The Regulations (7 C.F.R. § 46.43(i)) define f.o.b. as meaning, "... that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition ..., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed."

¹⁰ The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *Sales* § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U. S. No. 1, actually be U. S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U. S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for

The United States Standards for Grades of Table Grapes¹¹ provide a tolerance at shipping point of 8% for undersize bunches and for bunches and berries failing to meet the other requirements of the grade, including therein not more than 2% for defects causing serious damage and 0.5% for decay. Where, as here, the product is sold without a grade specification, we apply these percentages to the condition defects disclosed by the inspection. In addition, when we look at a destination inspection to ascertain compliance with the suitable shipping condition warranty, we apply an additional allowance to the tolerances set forth in the standards to allow for normal deterioration in transit. This is because we are looking at the condition at destination to determine compliance with the contract at shipping point. The load of grapes in question was in transit for approximately five days, in which case we allow 15% for average defects, including therein not more than 6% for defects causing serious damage and 3% for decay. As both the average defects and the serious damage disclosed by the inspection of the grapes in question exceed these allowances, we conclude that the grapes were not in suitable shipping condition. Complainant's failure to ship grapes in suitable shipping condition constitutes a breach of contract for which Respondent is entitled to recover provable damages.

The general measure of damages for a breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they

which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. See Pinnacle Produce, Ltd. v. Produce Products, Inc., 46 Agric. Dec. 1155 (1987); G & S Produce v. Morris Produce, 31 Agric. Dec. 1167 (1972); Lake Fruit Co. v. Jackson, 18 Agric. Dec. 140 (1959); and Haines Assn. v. Robinson & Gentile, 10 Agric. Dec. 968 (1951).

¹¹ The United States Standards for Grades of Table Grapes (European or Vinifera Type), § 51.880 through 51.912, published by the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, Fresh Products Branch, and available in printed form from that source, or on the Internet at <http://www.ams.usda.gov/standards/stanfrfv.htm>.

would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. U.C.C. § 2-714(2). The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale as evidenced by a proper accounting prepared by the ultimate consignee. While Respondent states it provided Complainant with an account of sales, the accountings submitted in this proceeding show only the average sales price of \$10.03 per carton.¹² Accountings that show only an average price are commonly not used to show the value of damaged goods resold by a buyer. See Great American Farms, Inc. v. William P. Hearne Produce Co., Inc., 59 Agric. Dec. 466 (2000); Supreme Berries, Inc. v. R. C. McEntire, Jr., 49 Agric. Dec. 1210 (1990). This is true because information concerning the individual sales is necessary to determine whether the sales were carried out in a prompt and proper manner. Moreover, we note that in the instant case there is evidence that the resales were not prompt, as nearly half of the grapes remained available for inspection on January 3, 2007, or more than three weeks after the first inspection took place. Under the circumstances, we cannot accept the average sales price reported by Respondent's customer as the best available evidence of the value of the grapes as accepted.

Absent an accounting, the value of goods accepted may be shown by use of the percentage of condition defects disclosed by a prompt inspection. Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc., 53 Agric. Dec. 1869 (1994). Under this method, the value the grapes would have had if they had been as warranted is reduced by the percentage of condition defects disclosed by a prompt inspection to arrive at the value of the grapes as accepted. The first and best method of ascertaining the value the grapes

¹² See Answer, Exhibit #'s 5 and 6.

would have had if they had been as warranted is to use the average price as shown by U.S.D.A. Market News Service Reports. Pandol Bros., Inc. v. Prevor Marketing International, Inc., 49 Agric. Dec. 1193 (1990). The December 11, 2006, U.S.D.A. Market News report for Miami, Florida, the nearest reporting location to Pompano Beach, shows that 19-pound containers of bagged Red Globe grapes were mostly selling for \$17.00 to \$18.00 per carton. Using the average reported price of \$17.50 per carton, we find that the 1,950 cartons of grapes in question had a value if they had been as warranted of \$34,125.00. When we reduce this amount by 16% to account for the defects disclosed by the inspection, we arrive at a value for the grapes as accepted of \$28,665.00.

As we mentioned, Respondent's damages are measured as the difference between the value the grapes would have had if they had been as warranted (\$34,125.00) and their value as accepted (\$28,665.00), or \$5,460.00. In addition, Respondent may recover the U.S.D.A. inspection fee of \$95.00 as incidental damages. With this, Respondent's total damages amount to \$5,555.00. When Respondent's damages totaling \$5,555.00 are deducted from the \$34,540.00 contract price of the grapes, there remains an amount due Complainant for the subject load of grapes of \$28,985.00. Respondent paid Complainant \$5,170.73 for the grapes. Therefore, there remains a balance due Complainant from Respondent of \$23,814.27.

Respondent's failure to pay Complainant \$23,814.27 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of Section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.,

269 U.S. 217 (1925); Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co., 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc., 29 Agric. Dec. 978 (1970); John W. Scherer v. Manhattan Pickle Co., 29 Agric. Dec. 335 (1970); and W.D. Crockett v. Producers Marketing Association, Inc., 22 Agric. Dec. 66 (1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. PGB International, LLC v. Bayche Companies, Inc., Order on Reconsideration, 65 Agric. Dec. 669 (2006).

Complainant in this action paid \$300.00 to file its formal Complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

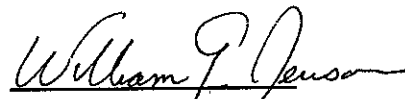
Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$23,814.27, with interest thereon at the rate of 1.67 % per annum from January 1, 2007, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

APR 23 2008

A handwritten signature in cursive script, appearing to read "William G. Jenson", written over a horizontal line.

William G. Jenson
Judicial Officer
Office of the Secretary